Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 78-6

* * *

HILMAR G. MOORE, RAUL JIMENEZ, AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE TEXAS BOARD OF HUMAN RESOURCES, ET AL.,

Appellants

vs.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,

Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

* * *

JURISDICTIONAL STATEMENT

* * *

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June, 1978

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HILMAR G. MOORE, RAUL JIMENEZ, AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE TEXAS BOARD OF HUMAN RESOURCES; JEROME CHAPMAN,INDIVIDUALLY AND AS COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; GENE LEGE, INDIVIDUALLY AND AS DIRECTOR OF THE HARRIS COUNTY CHILD WELFARE UNIT OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; AND MARIAN LOCKLEY, INDIVIDUALLY AND AS HEAD PROGRAM DIRECTOR OF THE MONTGOMERY COUNTY WELFARE UNIT OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES,

Appellants,

vs.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,

Appellees.

* * * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

* * * *

JURISDICTIONAL STATEMENT

* * * *

Appellants appeal from the Amended Judgment of the United States District Court for the Southern District of Texas, Houston Division, entered on March 8, 1978 (App. C, Vol. I, p. A-40), which among other holdings, declared Sections 11.10, 11.15, 17.02, and 34.06 of Title 2 of the Texas Family Code unconstitutional either on their face or as applied and permanently enjoined the use of these and other provisions of the Texas Family Code by Appellants. Appellants submit this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the three-judge District Court for the Southern District of Texas, Houston Division (App. A, Vol. I, p. A-1), is reported at 438 F.Supp. 1179 (S.D. Tex. 1977).

JURISDICTION

On April 19, 1976, this suit was brought under 42 U.S.C. §§ 1981 and 1983 and under 28 U.S.C. §§1331, 1343, 2201, and 2202. Although in the strictest sense jurisdiction was not contested below, Appellants do now point out, and will subsequently brief at the appropriate time, that 42 U.S.C. § 1981 and 28 U.S.C. §1331 have no applicability to this cause. Similarly, Appellants deny that the Declaratory Judgment Act, §§ 2201 and 2202 of Title 28 creates jurisdiction in this or any other case. The only possible basis for jurisdiction of the District Court is 42 U.S.C. § 1983 and 28 U.S.C. § 1343; however,

Appellees failed to state any claim under those statutes upon which relief could be granted. Pursuant to 28 U.S.C. §§ 2281 and 2284, as they then existed, a three-judge court was convened to determine the constitutional issues raised by Plaintiffs. The Judgment of the District Court (App. B, Vol. I, p. A-34) was entered on February 23, 1978. Notice of Appeal (App. E, Vol. I, p. A-67) was filed in the District Court on April 20, 1978.

In a motion filed in the District Court, Appellants requested that the injunction be stayed pending appeal from the Amended Judgment to this Court (App. F, Vol. I, p. A-72). On March 15, 1978, the District Court denied that Motion for a Stay (App. F, Vol. I, p. A-72). In an application filed with the Honorable Lewis F. Powell, Jr., Circuit Justice for the Fifth Circuit, Appellants requested that certain portions of the injunction be stayed while the appeal to this Court was pursued (App. G, Vol. I, p. A-78). On March 29, 1978, Associate Justice Powell denied that Application for a Stay (App. G, Vol. I, p. A-78). In an application mailed on June 6, 1978, to the Honorable William H. Rehnquist, Associate Justice of the United States Supreme Court, Appellants requested that one specific portion of the injunction be stayed while the appeal to this Court was pursued (App. H, Vol. I, p. A-87). As of this date, no ruling has been received regarding this new application for a stay.

STATUTES INVOLVED

The validity of Sections 11.10, 11.15, 17.02, and 34.06 of Title 2 of the Texas Family Code are involved in this appeal. The affected provisions and other relevant portions of the Texas Family Code (App. I, Vol. II, p. A-131), and applicable rules of the Texas Rules of Civil Procedure (App. J, Vol. II, p. A-182) are included in the accompanying appendices.

QUESTIONS PRESENTED BY THE APPEAL

I. WHETHER EQUITABLE RESTRAINT AND COMITY REQUIRED ABSTENTION

A. ENJOINING PENDING STATE PROCEEDINGS FORECLOSED OPPORTUNITY TO GO FORWARD WITH A SUIT IN WHICH ALL PROPER ISSUES COULD HAVE BEEN RAISED AND WAS IMPROPER ABSENT AN EXCEPTION TO *YOUNGER* PRINCIPLES

B. ENJOINING STATE PROCEEDINGS DISRUPTED THE STATE'S PROTECTION OF THE SAME INTERESTS WHICH UNDERLIE ITS CRIMINAL LAW

C. ENJOINING STATE PROCEEDINGS DISRUPTED A SUIT BROUGHT BY THE STATE IN ITS SOVEREIGN CAPACITY AND REFLECTED NEGATIVELY ON ITS COURTS' ABILITY TO ADJUDICATE FEDERAL CLAIMS

D. ENJOINING STATE PROCEEDINGS IN A SECOND SUIT FILED BEFORE ANY PROCEEDINGS OF SUBSTANCE ON THE MERITS HAD TAKEN PLACE IN FEDERAL COURT CONFLICTED WITH A PRIOR DECISION OF THIS COURT

E. ENJOINING STATE PROCEEDINGS INTERFERED WITH THE STATE'S RESOLUTION OF DIFFICULT QUESTIONS OF STATE LAW AND DISRUPTED ITS EFFORTS TO ESTABLISH COHERENT POLICY IN A MATTER OF SUBSTANTIAL PUBLIC CONCERN

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C. PREPONDERANCE OF THE EVIDENCE AS A STANDARD OF PROOF WAS NEVER APPLIED TO APPELLEES

D. APPELLANTS DID NOT CONTROL STATE COURT DOCKETS AND NEVER REFUSED APPELLEES' TIMELY HEARINGS

E. THE DISTRICT COURT'S ORDERS REMOVED ISSUES RELATING TO CUSTODY OF APPELLEES' CHILDREN FROM THE CASE

F. STATUTES RELIED UPON BY APPELLEES CANNOT ESTABLISH JURISDICTION OUTSIDE A CASE OR CONTROVERSY

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A. THE STATE'S INTEREST IN PROTECTING CHILDREN AND CHILDREN'S RIGHTS TO BE FREE FROM INJURY BY

THEIR PARENTS, TAKEN TOGETHER, OUTWEIGH ANY INFRINGEMENT ON PARENTS' CONSTITUTIONAL RIGHTS CAUSED BY THE CHILD ABUSE REPORTING SYSTEM

B. DUE PROCESS DOES NOT REQUIRE AN EMERGENCY EX PARTE HEARING ON THE VERY DAY OF TAKING EMERGENCY POSSESSION OF A CHILD

C. DUE PROCESS DOES NOT REQUIRE APPOINTMENT OF AN ATTORNEY AD LITEM, FOR A CHILD AT THE EMERGENCY EX PARTE HEARING

D. PREPONDERANCE OF THE EVIDENCE AS THE STANDARD OF PROOF IN SUITS SEEKING TERMINATION OF PARENTAL RIGHTS SATISFIES DUE PROCESS REQUIREMENTS

STATEMENT OF THE CASE

In this litigation Plaintiffs, John and Mary Sims (hereafter referred to as "the Simses"), contend that major portions of Title 2 of the Texas Family Code (hereafter referred to as "the Code") which are designed to protect children from abuse and neglect are unconstitutional infringements of family integrity. Defendants, officers and employees of the Texas Department of Human Resources (formerly the State Department of Public Welfare and hereafter referred to as "the Department") received on March 25, 1976, a report of physical abuse to a child, Paul Sims, and dispatched a worker, Rex Downing, to investigate the report. Mr. Downing found visible physical injury to eight-year-old Paul and learned that the injuries were inflicted when Mr. Sims came to Osborne Elementary School in Houston,

Texas, where Paul was a student, and savagely beat the child. The boy had also been beaten on the previous night by Mrs. Sims.

In order to protect Paul and his two young sisters from further harm and to determine the extent of their injury, the Department took the children into temporary custody and had them examined by a physician. The doctor found all three children were battered. Paul was injured to such an extent that he had to be admitted to St. Joseph's Hospital where he was treated for eleven days.

After taking protective custody of the children, Mr. Downing met with supervisory personnel at the Department that afternoon and the group decided that a suit for protection of a child in an emergency under Section 17.02 of the Code should be filed in Houston, Harris County, Texas, where the children were found. The suit was filed in the District Court of Harris County on March 26, 1976, the day after the children's removal. Judge Robert Lowry issued an emergency ex parte order appointing the Department temporary custodian of the children (Section 17.04 provides for these emergency orders). The statute does not require service on the parents, at this emergency stage of the proceedings, Section 17.03, and none was made. The Simses had actual knowledge of the suit and retained an attorney on the day the suit was filed.

On March 31, 1976, the Simses appeared personally and through their attorney who submitted a motion to modify the order. A hearing on such a motion is statutorily mandated but Judge Lowry was temporarily absent and the motion was not filed by the court clerk, who returned it to the Simses' attorney. Instead of pursuing a hearing on the motion, the Simses filed a petition for a writ of habeas corpus. At a hearing on the habeas petition held April 5, 1976, Judge Lowry

determined that the children were residents of Montgomery County, Texas, and verbally transferred the proceedings to the district court in Montgomery County. The Simses' attorney pursued that habeas action no further.

The Department, seeking continued custody of the children so that further investigation and work with the family could be done prior to any final disposition of the case, filed a suit affecting the parent-child relationship in Judge Lowry's court that afternoon. The Judge issued a temporary restraining order continuing temporary custody in the Department and transferred the suit to Montgomery County where the children resided and continuing jurisdiction lay. (See Sections 11.04, 11.05, and 11.06 of the Code.)

The Simses and their attorney had actual knowledge that the court had decided that the children resided in Montgomery County and that any suit affecting their relationship to their parents was in the continuing jurisdiction of that court. On April 9, 1976, when the Sims file was received in Montgomery County District Court, John Davis, a juvenile probation officer in Montgomery County, tried unsuccessfully to find the Simses. The Simses' attorney was notified that the suit was pending in Montgomery County and that a hearing had been set for May 8, 1976; citation was not issued. At no time did the Simses ask for an earlier hearing or seek mandamus directing a hearing.

On April 19, 1976, the Simses filed this cause in the United States District Court for the Southern District of Texas, Houston Division. The Simses' application for a temporary restraining order in their cause in the federal district court was denied by Judge John Singleton on April 20, 1976. A hearing on their application for a temporary injunction was set for April 29 and later reset for May 5. When the Department

received notice on April 22, 1976, of the suit in federal court, state court proceedings were suspended foreclosing the state's opportunity to resolve the matter. The Simses returned to state court and filed on May 4, 1976, a motion for leave to file an original petition for writ of habeas corpus with the Court of Civil Appeals of the State of Texas, Fourteenth Supreme Judicial District. The motion was denied for want of jurisdiction.

At the hearing on May 5, Federal District Judge Singleton found the children were not legally in the Department's custody because the temporary orders issued by the state court had expired by operation of law. (See Sections 17.04 and 11.11(b) of the Code and Rules 680 and 681 of the Texas Rules of Civil Procedure.) Thereupon, Judge Singleton ordered the children returned immediately to their parents and determined that the Department was *not* enjoined from taking proper action to gain custody of the children.

The Department filed a new suit in Montgomery County on May 14 seeking custody of Paul Sims. Under this new suit, Judge Ernest Coker, Sr., issued a show cause order and a writ of attachment ordering that Paul Sims be delivered to the temporary care of his maternal grandparents (by adoption), Mr. and Mrs. James Carter. A show cause hearing was set for May 21, but the Simses avoided service of citation and attachment by absenting themselves from residence, school, and place of employment until May 21, therefore, the hearing was reset for June 21.

Meanwhile back in federal court, the Simses filed a second application for a temporary restraining order without notice to the Department and this time Judge Singleton issued, in apparent violation of Rule 65(b)(2), F.R.C.P. and 28 U.S.C. §§ 2281 (repealed Aug. 12, 1976) and 2284(3), an ex parte order forbidding the attachment. When the requested three-judge court was

constituted, a hearing was held on June 7. At the hearing, a preliminary injunction which prohibited further proceedings in state court pending a final hearing on the merits in federal court was issued. Trial on the merits on October 26, 1976, resulted in judgment for Plaintiffs.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal is important because fifty states have child abuse statutes similar to those declared unconstitutional by the three-judge court (App. L, Vol. III, p. A-220) and the effect of the court's order is to put battered children back with their parents in danger of serious harm and, in some cases, in danger of their lives.

The court's order that emergency ex parte hearings be held on the very day of a child's removal from his parents' custody is not required by due process and is a practical impossibility in many parts of this and other states where courts are itinerant, great distances exist between the place where the child is found and the place where a judge resides or sits, and children are removed on holidays and weekends. Appointment of an attorney ad litem for a child at the emergency ex parte hearing is not required by due process and may be too expeditious to be effective. Proof by clear and convincing evidence in suits affecting the parent-child relationship is not required by commonly accepted beliefs and custons as well as by statutory and constitutional law which make evidence difficult to amass.

Substantial issues presented involve family law and could best be handled by state courts. The three-judge court should have abstained because proceedings in which all the constitutional questions properly raised in this suit could have been decided were pending in state court at the time this suit was brought in federal court.

Further, many issues involving the constitutionality of state statutes decided by the three-judge court were not justiciable.

I. WHETHER EQUITABLE RESTRAINT AND COMITY REQUIRED ABSTENTION

The long-established rule that federal courts will not enjoin state court proceedings controlled in the instant case and required abstention. *Younger v. Harris*, 401 U.S. 37 (1971). Standards of equitable restraint when federal courts are requested to interfere with state court civil functions go far beyond the stringent standards of private equity jurisdiction. *Huffman v. Pursue*, 420 U.S. 592, 603 (1975). In addition to finding that a federal plaintiff has no adequate remedy at law and will suffer great and immediate irreparable injury if equitable jurisdiction is denied, the federal court must consider notions of comity which are basic to our federalism. Comity posits that the national sovereign fares best when the states and their institutions are left to perform their separate functions. *Huffman, supra*, at 601; *Younger v. Harris, supra* at 44. The balance struck between state and federal courts is especially delicate when the federal court is asked to declare a state statute unconstitutional. Even a showing that a statute on its face violates rights protected by the Constitution will not justify a federal injunction to prevent a state's good faith attempts to enforce its constitutionally infirm statute. *Huffman, supra*, at 602; *Younger, supra*, at 49 and 53; *Watson v. Buck*, 313 U.S. 387 (1941). Absent a showing of bad faith prosecution or harrassment by the state in bringing suit or some equally egregious and extraordinary circumstances which will result in irreparable damages to the person being sued by the state, a federal court wrongfully exercises its equity jurisdiction to enjoin state court proceedings. *Younger, supra*, at 54.

I. A. ENJOINING PENDING STATE PROCEEDINGS FORECLOSED OPPORTUNITY TO GO FORWARD WITH A SUIT IN WHICH ALL PROPER ISSUES COULD HAVE BEEN RAISED AND WAS IMPROPER ABSENT AN EXCEPTION TO *YOUNGER* PRINCIPLES

At the time of the filing of this proceeding in federal court, Appellees had an opportunity to present their federal claims in a suit pending in state court, and no more is required to invoke *Younger* abstention, *Juidice v. Vail*, 430 U.S. 327, 336-337 (1977). The three-judge court dealt with abstention as a threshold issue and concluded that *Younger* principles did not apply. Two reasons were offered to justify this conclusion: "the nature of the state action and the nature of the plaintiff's (sic) challenge." *Sims v. State Department of Public Welfare*, 438 F. Supp. 1179 (S.D. Tex. 1977).

Characterizing the state action as "multifaceted," the court said that the dispute between Appellees and the State of Texas would involve more than a single state judicial proceeding in which Appellees could raise their constitutional defense. *Sims, supra*, at 1187.

This Court's interpretation of inability to defend in a single proceeding in state court was demonstrated in its application of that exception to the *Younger* rule against enjoining of state court proceedings in the case of *Dombrowski v. Pfister*, 380 U.S. 479 (1965). There, Negro citizens were harrassed by repeated arrests, seizures, and threats of prosecution. None of the prosecutions was intended to be carried to its judicial conclusion. Each was brought to intimidate, not to permit resolution in the state courts. Because many suits had been and would be brought and none would be pursued to judgment, the federal plaintiffs would be unable to defend themselves in a single suit in state

court, not because their complaint was multifaceted and would require multiple defenses.

Multifaceted litigation can be effectively tried in state court proceedings. Indeed, state courts are often less pressed by time constraints caused by overcrowded dockets and thus, can better deal with extensive discovery and lengthy development at trial than can three-judge federal courts which require the attendance of three busy jurists who are frequently unable to spend the time necessary to allow full development of the facts in multifaceted litigation. Multifaceted state action which allegedly violated Appellees' right to privacy under the United States Constitution and improperly impinged on their right to family integrity could be raised as a defense or as a counterclaim in a single proceeding in state court.

While it is true that two suits were pending in the state courts prior to the federal court's taking any action of substance in this cause, the court found that neither of them was brought for harrassment. The first suit filed in Harris County and transferred to Montgomery County was pending when the court below issued a temporary restraining order returning the children to Appellees. At that time, the court expressly instructed Appellants that the temporary restraining order did not prevent their taking steps properly to seek custody of the children in appropriate judicial proceedings. *Sims, supra* at 1185. Appellants then filed a second suit in Montgomery County. Both suits sought the same relief; a final decision on the merits in either would have rendered the other res judicata. Under these circumstances, the pendency of two suits in state court did not mean that Appellees could not defend themselves in a single proceeding in state court.

In the section of its opinion in which it characterized

the state action in *Sims* as multifaceted, the court pointed out that:

> Many of the challenged actions taken by the state do not and will not involve any judicial proceeding. *Sims, supra*, at 1187.

To illustrate non-judicial application of a statute, the court described the child-abuse reporting system. *Sims*, n. 5, *id.* The illustration is not illuminating. The application of statutes without judicial involvement seems unlikely to make state action mysteriously or uncommonly multifaceted. It would appear normal, even desirable, for almost every statute to be applied without judicial involvement. The lack of initial judicial involvement is not an extraordinary circumstance which should permit a federal court to find an exception to *Younger* under which it may enjoin state court proceedings.

The three-judge court found procedures for emergency removal of a child from his parents' custody "patently and flagrantly violative of basic constitutional guarantees." *Sims, supra*, at 1192 and n. 1 at 1183. Immediately thereafter, the court narrows, interprets, and rewrites the provisions it found constitutionally infirm.

Finally, the court found substantial portions of the Code unconstitutional on their face, and permanently enjoined Appellants from applying and enforcing them. *Sims, supra*, at 1195. The preceeding directives of the court made it unmistakably clear that Appellants were in fact enjoined only from applying the portions except as the court set out. However zealous the court might have been and even if it spoke in hyperbole, it clearly did not prohibit the use of all existing statutory procedures to remove children from immediate danger until a proper rewriting of the statute. (See discussion of

Dombrowski, supra, in *Younger, supra*, at 51-54.) The district court's modifications of the challenged statutory provisions negated its characterization of any of the offensive provisions as "patently and flagrantly violative of basic constitutional guarantees."

As further basis for its assertion that an injunction was appropriate, the district court found highly unusual circumstances brought this case within exceptions set out by this Court in *Younger* and *Trainor v. Hernandez*, 431 U.S. 422 (1977), and found these circumstances compelled the court to grant equitable relief. The court said:

> ...the confusion, the procedural irregularities, and the absence of a fair opportunity to present constitutional claims at a meaningful time ... justify equitable relief even if *Younger* principles did apply. *Sims, supra*, at 1188.

Though this Court has not set a rigid rule defining extraordinary circumstances which allow enjoining of state court proceedings, the exceptions devised under *Younger* clearly infer intentional violation of federally protected constitutional rights is required. Bad faith prosecution, harrassment, and statutes obviously written in wanton disregard of the Constitution as interpreted by this Court are examples of extraordinary situations which permit a federal court to enjoin proceedings in state courts. No such knowing or deliberate disregard of Appellees' constitutional rights was found credible by the court below or could have been found credible by any reasonable person.

Assertions, or even proof, that mistakes, errors, and confusion abounded in the state court's management of the early stages of the proceedings pending there cannot be said to rise to the extraordinary circumstances that *Younger* admits as exceptions to its rule. The federal

court could not act as a "primary and powerful" source of vindication of federally protected rights and allow deliberate disregard of federal law, nor could federal courts act as proponents of comity and our federal system if they intervened in state court proceedings because state proceedings were initially inept or incorrect or state agencies bungled. Unfortunately, it cannot be honestly said that judicial confusion, delay, and error is a malady confined to state courts; issuing an injunction on the basis of these unextraordinary circumstances clearly contravenes *Younger* principles. Since harrassment, bad faith prosecution, the necessity of defending in multiple suits in state court, flagrant or patent statutory violations of the Constitution, and other extraordinary circumstances were absent in the instant cause, *Younger* principles applied in full force and the federal court should have abstained from enjoining state court proceedings.

I. B. ENJOINING STATE PROCEEDINGS DISRUPTED THE STATE'S PROTECTION OF THE SAME INTERESTS WHICH UNDERLIE ITS CRIMINAL LAW

Here as in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 605 (1975), the state brought proceedings in state court "to protect the very interests which underlie its criminal laws." The resulting threat to our federal system caused by federal court intervention in state court proceedings is as grave when the state institutes civil proceedings to enforce its substantive policies as when the state prosecutes under its criminal laws. *Huffman, supra*, at 604.

While pending state proceedings in this case were civil, the child abuse statutes challenged in this action and being enforced in the state proceeding are designed to protect children from dangerous adults, who, as in this case, often are their parents. This protective

purpose of child abuse legislation is closely akin to that underlying criminal statutes. Criminal statutes are merely more inclusive in their protective function; they protect society from dangerous individuals. Both types of statutes regulate by defining proscribed behavior, giving notice that the described behavior is prohibited, and by setting penalties for engaging in the prohibited behavior.

Substantive state policies undergird child abuse statutes. Although parents are rarely criminally prosecuted for assaulting or battering their children unless their conduct results in the child's death, constitutes sexual abuse so egregious that the community or other children unrelated to the offending adult are threatened, the analogy to criminal statutes remains applicable. (See Texas Penal Code, Section 22.04 for criminal statute pertaining to injury to a child.) But for the deference given to the parent-child relationship, adults who physically injure children would routinely be punished under appropriate criminal statutes.

Another similarity between criminal proceedings and these civil proceedings is the availability of habeas corpus. Enforcement of child abuse statutes often gives rise to parents' seeking writs of habeas corpus to gain possession of a child illegally detained by one not entitled to his custody. The availability of habeas proceedings gives the parent two methods of bringing constitutional claims before the court as in criminal cases. (Habeas discussed in *Huffman, supra*, at 605 and 606.)

It is clear that the district court's enjoining of proceedings in state court disrupted the state's enforcement of the same interests underlying its criminal laws and brought this cause within this Court's

holding in *Huffman*, which made *Younger* comity principles equally as applicable to federal judicial interference in civil proceedings which are more akin to criminal prosecution than are most civil cases, as to state criminal proceedings. at 603-605.

I. C. ENJOINING STATE PROCEEDINGS DISRUPTED A SUIT BROUGHT BY THE STATE IN ITS SOVEREIGN CAPACITY AND REFLECTED NEGATIVELY ON ITS COURTS' ABILITY TO ADJUDICATE FEDERAL CLAIMS

The instant case falls squarely within this Court's holding in *Trainor v. Hernandez*, ___U.S.___ 97, S.Ct. 1911 (1977). There the state had brought civil proceedings for welfare fraud and attached the recipients' property without notice. *Younger* and *Huffman* principles applied where the state in enforcing its laws took property without notice, absent a showing that state courts were inadequate to resolve the federal due process claims.

Absent a showing that opportunity to contest the validity of the attachment would be unavailable in state proceedings, the Court observed in *Trainor*, *supra*, at 1917 and 1920, that it must not assume due process claims would not be addressed in state court proceedings. In *Sims*, *supra*, 1193, Appellees had statutory remedies for challenging the validity of the taking of their children by a motion to modify which could have been filed at any time prior to the expiration of the temporary emergency order. (Section 17.06). Habeas corpus was available also. These remedies were available in addition to the opportunities which would have been available at a trial on the merits and in subsequent appeal.

The Court below found "the absence of a fair opportunity to present constitutional claims at a meaningful time" to be one of the highly unusual

circumstances justifying immediate federal equitable relief. When viewed in light of this Court's counsel that state appellate courts are often the most appropriate forum for resolving constitutional contentions, *Huffman*, *supra*, at 609, the district court's assertion that no fair opportunity to present constitutional claims at a meaningful time existed is unwarranted. The fact that Appellees were frustrated in initial presentation under these provisions does not show that they could not have resolved their constitutional claims. Thus, here as in *Trainor*, *supra*, at 1920, one cannot fairly conclude that state remedies were inadequate to vindicate federal constitutional claims.

The Court in *Trainor*, *supra*, at 1919, further emphasized the importance of applying *Younger* principles in state enforcement proceedings when it required that the federal district court have some basis for finding a statute violative of express constitutional prohibitions in every clause, sentence, and paragraph. Refusal of the Court to permit the unsubstantiated labelling of a statute as flagrantly and patently violative of constitutional rights necessarily precludes that same characterization of some of the statutory provisions challenged herein. *Sims*, *supra*, at 1192. Since any purported constitutional infirmities of the statutes cannot be shown to infer wanton disregard of constitutional rights, no extraordinary circumstances existed in this case to allow an exception to the rule that federal courts ordinarily will not enjoin state court proceedings.

Analyzing the state's dilemma when its enforcement proceedings are disrupted by federal court proceedings, this Court said such action:

> confronted that state with the choice of engaging in duplicative litigation . . . risking a . . . federal injunction, or of interrupting

> enforcement proceedings . . . *Trainor, supra*, at 1919.

Of course, the State of Texas did not have to risk a federal injunction; it had to live with one. As a result of the federal injunction, the state lost its opportunity to prove that Appellees had abused their children and was prevented from taking any further action to protect the children. Comity principles clearly required that the state, acting in its sovereign capacity to protect its minor citizens, be allowed to go forward with state proceedings in which Appellees could raise their constitutional claims and after which Appellees could appeal to this Court as a matter of right. Federal interference with state court proceedings reflected negatively on the state court's ability to carry out its responsibility to safeguard constitutional rights. *Steffel v. Thompson*, 415 U.S. 452, 460-461 (1974).

I. D. ENJOINING STATE PROCEEDINGS IN A SECOND SUIT FILED BEFORE ANY PROCEEDINGS OF SUBSTANCE ON THE MERITS HAD TAKEN PLACE IN FEDERAL COURT CONFLICTED WITH A PRIOR DECISION OF THIS COURT

A further holding of this Court in the *Younger* line of cases was made in a context similar to that of the instant case and forbade federal court interference with state criminal proceedings filed after the federal complaint but before any substantive proceedings on the merits in the federal court. *Hicks v. Miranda*, 422 U.S. 332 (1975). To hold otherwise, the Court reasoned, would trivialize *Younger* principles. *Hicks, supra*, at 350. In the case now presented, Appellants had filed a second suit in Montgomery County on May 14, 1976, after Judge Singleton advised Appellants at a hearing on May 5 that they could file a proper suit to protect the

Sims children. *Sims, supra*, at 1185. When Appellants filed their second suit they believed that by seeking to protect only Paul Sims and obtaining a writ of attachment to place the boy with his adopted grandparents they were complying with Judge Singleton's earlier counsel. This second proceeding pending in state court before the three-judge court had taken any action on the merits - all earlier action was by Judge Singleton alone - was acknowledged in the court's opinion but was not discussed. The district court seems to have regarded it as unimportant, but *Hicks, supra*, at 349, clearly makes this filing of such a suit call for the application of *Younger* principles in full force.

In *Hicks, ibid.*, the state proceedings were criminal but the Court's decision did not turn on the characterization of the state proceedings. Rather it firmly rested in notions of comity which enable dual sovereigns to perform their overlapping functions with integrity. Vague and conclusory findings of bad faith and harrassment would not be sufficient to call into play one of *Younger's* limited exceptions. *Hicks, supra* at 350. Indeed, the Court admonished, a conclusion of bad faith or harrassment would not necessarily follow had it been shown that the state courts erred on some issues of federal or state law. *Hicks, supra*, at 351. Yet, in the present case the district court found procedural irregularity, confusion, and attendant delay in Appellees' opportunity to present their constitutional claims justified the granting of federal equitable relief even if *Younger* principles applied. *Sims, supra*, at 1188. The district court's finding of extraordinary circumstances which amounted to an exception to the rule that federal courts ordinarily will not interfere with state proceedings contravenes this Court's holding in *Hicks, supra.*

I. E. ENJOINING STATE PROCEEDINGS INTERFERED WITH THE STATE'S RESOLUTION OF DIFFICULT QUESTIONS OF STATE LAW AND DISRUPTED ITS EFFORTS TO ESTABLISH COHERENT POLICY IN A MATTER OF SUBSTANTIAL PUBLIC CONCERN

There is no federal family law. Domestic relations have traditionally been the bailiwick of state courts. The state courts' management of venue and continuing jurisdiction goes to the core of its administration of justice in child custody cases. Much as "the contempt process . . . vindicates the regular operation of . . . (the state's) judicial system . . .," *Juidice v. Vail*, 430 U.S. 327 (1977), the state's insistence upon parents' presenting their children before the appropriate state forum for presentation of questions of custody is an essential element of its enforcement of statutes and of prior decisions in custody disputes. The availability of a federal forum to parents against whom child custody proceedings are pending in state court impedes the state's effort to shape and enforce coherent policy in this area of substantial public concern. See *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), for a discussion of the appropriateness of abstention when problems of public policy are paramount.

Whether child custody battles arise in the context of divorce or when transient troubled families move from place to place leaving suits affecting the parent-child relationship behind them, venue and continuing jurisdiction of subsequent suits presents a complex problem which may affect the resolution of the custody issue on the merits.

Venue for suits affecting the parent-child relationship lies where the child resides. (Section 11.04

of the Code.) Once such a suit is brought, continuing jurisdiction of all subsequent suits affecting the parent-child relationship lies with the Court where the original suit was filed. (Section 11.05 of the Code.) Texas maintains a central file of all such suits and requires that a petition assert that the court in which the suit is filed has continuing jurisdiction or that no court has continuing jurisdiction of the suit being filed. (Sections 11.08 and 11.17 of the Code.) Complex and relatively new statutory provisions govern the transfer of suits affecting the parent-child relationship. Texas' appellate courts are in the process of construing these statutes. See, for example, *Cassidy v. Fuller*, No. B-7369, 21 TEX. SUP. CT. JOURNAL 325 (1978), in which the Texas Supreme Court interpreted Section 11.06 of the Code.

Judge Lowry's transfer of the habeas corpus proceeding and the suit affecting the parent-child relationship, *Sims, supra*, at 1184, from Harris County to Montgomery County was undoubtedly made to establish venue where the children resided and where continuing jurisdiction of subsequent proceedings properly lay. The state court's management of venue and continuing jurisdiction in child custody suits lies at the core of its administration of justice in the area of family law dealing with the custody and possession of children. The federal court should have abstained under *Younger* principles or because substantial issues of state policy were involved, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

II. WHETHER A CASE OR CONTROVERSY EXISTED

The threshold inquiry in a federal court is whether the plaintiff has standing to invoke the court's judicial powers to resolve the dispute and to ask the court to use its remedial powers to right asserted wrongs. Standing

may be viewed as flowing from the requirement that federal courts decide only cases or controversies, United States Constitution, Article III, or from prudential considerations. Case or controversy requirements limit the judiciary to functioning in an adversary context in which opposing parties hone the issues into the sharpest possible focus for examination by the court called upon to resolve the dispute and place the judiciary in its proper role in our tripartite system. *Flast v. Cohen*, 392 U.S. 83, 94, 95 (1968).

Private litigation is almost always justiciable. In the area of constitutional challenges to statutes, the question of justiciability frequently arises and is at issue in the present case. The district court's power to decide the constitutionality of a statute is necessarily dependent upon its power to decide a case properly before it. *Marbury v. Madison*, 1 Cranch 137 (1803). Appellants contend that in several respects the statutes challenged by Appellees were not properly before the court. Appellants further assert that Appellees never showed likelihood of immediate irreparable harm and a lack of adequate remedy at law in order to meet Article III case or controversy requisites with regard to the issuance of equitable relief. *O'Shea v. Littleton*, 414 U.S. 488, 502-508 (1974).

II. A. APPELLANTS HAD NO POWER TO APPOINT AN ATTORNEY AD LITEM, NEVER WERE ASKED TO DO SO, NEVER REFUSED, AND THE THREE-JUDGE COURT DENIED THEIR REQUEST THAT IT APPOINT ONE

There was no jurisdiction in the court below concerning the court's failure to appoint an attorney ad litem for the Sims children. *Sims, supra*, at 1193-1195. Appellants were the wrong defendants against whom to raise this issue. No state legislative appropriation or

statutory provision gives Appellees power to appoint attorneys ad litem for children in suits affecting the parent-child relationship in which the state is a party. (See Section 11.10 of the Code.) Even if there were such authority, questions of conflict of interest could be raised with regard to Appellants' exercise of that authority. It is very unlikely that parents would fail to contest the appointment by the Appellants of attorneys ad litem for their children when the Appellants are seeking to remove custody from those parents. Few litigants would freely confide in an attorney appointed by, or even in the most remote manner beholden to, his opponent in court. Further, Appellants were never asked to appoint an attorney ad litem, never refused to do so, and in fact, Appellants' motion that the three-judge court do so was summarily denied. *Rizzo v. Goode*, 423 U.S. 362, 377 (1976).

The judges, who were dismissed as defendants early on in these proceedings, were the only persons who could have applied the alleged unconstitutional provisions in a manner which would have met constitutional requirements. Appointment of an attorney ad litem to protect the interests of a child made subject of suit seeking termination of parental rights is within the discretion of the judge. (See Section 11.10(a) and (c).) *Sims, supra*, at 1194.

Of course, even this discussion ignores the fact that a termination suit was never brought by Appellants against Appellees. The lack of application of or injury by the challenged statute which would have called Section 11.10 into play clearly makes this issue one as to which there is no case or controversy.

II. B. APPELLEES WERE NOT INJURED BY THE CHILD ABUSE REPORTING SYSTEM

The three-judge court found the gathering and dissemination of information in the Child Abuse and Neglect Report and Inquiry System (hereinafter referred to as "CANRIS") without prior judicial determination to be violative of due process and the right to privacy. *Sims, supra,* at 1192. The relief decreed is a far-reaching and unwarranted interference with the internal affairs of the state as it investigates child abuse. *Rizzo, supra,* at 371-381. Appellees were never injured by the CANRIS. No allegation that dissemination of information occured was ever made in this case, and none ever occurred.

The CANRIS prevents any dissemination of information stored therein. Not only were Appellants improper defendants as to any alleged infringement of Appellees' privacy rights, but any alleged violation of due process or privacy rights also resulted in no injury to Appellees. The facts alleged support no "actual causal relationship" between the challenged statute or practices under it and Appellees' alleged injury. Appellees rely upon some remote possibility of injury and thus failed to establish their standing to challenge the CANRIS. *Warth v. Seldin,* 422 U.S. 490, 502-508 (1975).

II. C. PREPONDERANCE OF THE EVIDENCE AS A STANDARD OF PROOF WAS NEVER APPLIED TO APPELLEES

The statutory provision for preponderance of the evidence as the standard of proof in suits affecting the parent-child relationship was never applied to Appellees. Since no proceeding in state court moved forward to allow the standard to be used in this case, Appellees were not injured by it even in the pending Chapter 14 suits. Additionally, no change in policy or increased diligence on Appellants' part could have affected the remedy decreed by the district court. The

fact of injury caused by the challenged standard could not be demonstrated outside of judicial proceedings. The mere characterization of Appellees' right to family integrity as fundamental cannot be the basis for concluding that preponderance of the evidence as the standard of proof does not meet due process requirements. In that respect, the district court's finding of a justiciable dispute between Appellants and Appellees rests on conjecture that injury would surely result if the standard were applied.

Any purported threat of immediate irreparable injury with regard to the standard of proof used in termination proceedings was remote indeed. See *O'Shea, supra,* at 502-508. The district court based its finding of standing to challenge Chapter 15 of the Code on the spectre of the future filing of a suit seeking termination of parental rights. *Sims, supra,* at 1190. The spectre is not a frightening one for several reasons. The only evidence supporting the existence of this apparition was caseworker Rex Downing's statement in a deposition that "he would seek termination as a part of the Montgomery County proceeding." *Sims, id.* It is not clear what Mr. Downing meant. Did he mean "I would if I could"? Or did he mean "I will"? The district court did not allow live testimony to clarify this ambiguous statement on which it placed great reliance. Further, Mr. Downing had no authority to file a termination suit. He was required to confer with supervisory staff and to obtain a consensus as to the appropriateness of the filing of a petition seeking termination. In any case, Mr. Downing was obviously unable to carry out the purported threat; because the referred to suit in Montgomery County, *Sims, id.*, had already been filed when the federal district court enjoined all attempts to enforce the challenged state laws against Appellees and the suit sought custody, not termination. Finally, and most importantly, Mr. Downing was the lone alleged

threatener and he was not joined as a defendant in these proceedings in federal court. *Rizzo, supra,* at 371-373 (1976).

Parties joined in their official capacity and individually were not shown to have threatened Appellees with filing a termination suit sometime in the future, thus Appellees had no proper defendant against whom they could raise the issue of threat of immediate irreparable injury under Chapter 15. *Rizzo, id.* Causation must be shown in actions brought under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. the Civil Rights Act of 1871, 42 U.S.C. §1983. Liability under respondeat superior theory will not be imposed on government officials because the agency for which they work employs a tortfeasor. The accused official must be shown to have implemented or executed a policy or statute which violated the complainants' constitutional rights unless governmental custom is shown to have injured the complainants. *Monell v. Department of Social Services of the City of New York,* ___U.S.___, 46 L.W. 4569 (June 6, 1978); *Rizzo, supra,* at 376-377.

II. D. APPELLANTS DID NOT CONTROL STATE COURT DOCKETS AND NEVER REFUSED APPELLEES' A TIMELY HEARING

Appellants never refused Appellees a timely hearing. The state court's docket is controlled by the judge or his designee. Since the judges were dismissed from these proceedings at an early stage, Appellees were left with no proper party against whom to assert their due process claims concerning injuries caused by departure from the statute's mandate that a hearing be held at the expiration of the ten-day order to determine whether the children should be returned to Appellees or whether a suit affecting the parent-child relationship should be filed.

Failure of Appellees to obtain the filing of or a hearing on their motion to modify was in no way caused by Appellants' conduct. *Sims, supra,* at 1184. Appellants did not interfere with the filing of the motion. Appellees might have been able to state a claim against the clerk of the court or the judge but neither of them was a party to this suit when it was decided on the merits. *Rizzo, supra,* at 377. Equitable relief was granted against Appellants without adequate showing of responsibility or causal connection between Appellants' conduct and the injury alleged.

II. E. THE DISTRICT COURT'S ORDERS REMOVED ISSUES RELATING TO CUSTODY OF APPELLEES' CHILDREN FROM THE CASE

No lively controversy existed between Appellants and Appellees with regard to the possession of the children at the time of the hearing on the merits in this federal proceeding and none exists for appellate review. *Roe v. Wade,* 410 U.S. 113, 125 (1973) (citations omitted). Judge Singleton had ordered the children returned to Appellees. Appellants had complied with that order. The children were in the custody of their parents and the issue of custody was not litigated in these or any other proceedings.

In the contest based on the writ of attachment issued in the second suit pending in Montgomery County, questions relating to the possession of Paul Sims were not ripe for judicial determination since Appellees had not been served with citation and attachment had not been levied. Any threat concerning the possible levying of attachment was not an injury for judicial determination. Even if attachment had been carried out and Paul Sims had been temporarily placed with his grandparents, it is not clear what effect his placement would have had upon Appellees' access to him.

enjoyment of his companionship, and the parent-child relationship between Appellees and the boy. The court never learned the proximity of grandparents and Appellees living quarters, the status of their relationship, or any other relevant fact about the possible effect of levying of the attachment.

Because Appellees had present custody of their children, issues relating to the timeliness of hearings after removal, notice, and other aspects of removal procedure had become either moot or conjectural and thereby inappropriate for judicial resolution. Judge Singleton's returning the children under an ex parte order prior to any adversary hearing in federal court had a mooting effect on the issues revolving around possession of the children. The three-judge court's enjoining of state proceedings removed the issue from the case on the merits and had the effect of permanently resolving the issue. *Warth, supra*, at 516.

II. F. STATUTES RELIED UPON BY APPELLEES CANNOT ESTABLISH JURISDICTION OUTSIDE A CASE OR CONTROVERSY

The right to contract, which is one subject of the Civil Rights Act of 1871, 42 U.S.C. §1981, was never raised as a real issue in this case and therefore jurisdiction under it does not lie upon these facts. Appellees stated no cause of action under the general federal question statute, 28 U.S.C. §1331. Jurisdiction is not conferred by the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; these sections merely create a remedy. *Terminal Freight Handling Co. v. Solien*, 444 F.2d 699, *cert. denied* 405 U.S. 996 (1972). Section 1983 of the Civil Rights Act of 1871 and its companion jurisdictional statute, Section 1343 of Title 28, are the only possible basis of jurisdiction as to which a cause of action could have been alleged. However, under these statutes a

federal plaintiff must have a defendant who actually violated plaintiff's constitutional rights. Respondeat superior theories of vicarious responsibility are impermissible under these statutes which are intended to enforce the 14th Amendment. *Rizzo, supra*, 376-377; *Monell v. Department of Social Services of the City of New York, supra*. In any case a proper defendant must be shown to have authority and capacity to perform the function desired as relief.

III. WHETHER THE CHALLENGED PORTIONS OF THE CHILD ABUSE STATUTES ARE UNCONSTITUTIONAL

A. THE STATE'S INTEREST IN PROTECTING CHILDREN AND CHILDREN'S RIGHTS TO BE FREE FROM INJURY BY THEIR PARENTS, TAKEN TOGETHER, OUTWEIGH ANY INFRINGEMENT ON PARENTS' CONSTITUTIONAL RIGHTS CAUSED BY THE CHILD ABUSE REPORTING SYSTEM

The district court found that the use of the Child Abuse and Neglect Reporting and Inquiry System (CANRIS, Section 34.06 of the Code) for collecting and storing information gathered by the state in its legitimate investigation of reports of child abuse is violative of the right of privacy and due process guarantees absent a judicial determination of abuse or neglect. *Sims, supra*, at 1192. The court said that the state may maintain investigatory files, but it found CANRIS exceeds permissible investigatory purposes.

Both the court and the state agree that the purpose of investigating reports of child abuse is to protect children who are in danger. That the state has a legitimate interest in protecting children from abuse and neglect is not contested. Maintaining files

containing information discovered during investigation assists the state in determining whether protection is needed and if so, what kind. Investigating reports of child abuse necessarily affects the privacy of the family to some degree. The right to family integrity and the right to preservation of the zone of privacy which surrounds the family are of great importance but they, like other constitutionally protected rights, are not absolute. Rather, they are subject to reasonable regulation in furtherance of a legitimate state interest. *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 168, 169 (1944). Pursuant to its legitimate interests the state can make and enforce reasonable laws which do not violate due process. *Newton v. Burgin*, 363 F.Supp. 782 (W.D.N.C. 1973 (*aff'd*, 414 U.S. 1139)(1974); *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972).

The district court in effect found the state's statutes designed to effectuate its legitimate interest in protecting children were unreasonable; that is, they violated the right to privacy and due process guarantees.

Appellants asserted above that the right to privacy is not absolute but the question of the nature of that right remains to be established. In *Paul v. Davis*, 424 U.S. 693, 713 (1976), this Court said that the right to privacy concerns the areas of "marriage, procreation, contraception and childrearing and education." These areas are essentially personal and are the places in which individuals may be best able to exercise discretion, but even this list above contains an area which for most of us is largely controlled by the state. The state's interest in education is often superior to that of parents'. Most of us are intimately acquainted with compulsory school attendance laws.

The district court quoted *Davis, supra*, at 713 in its

opinion. *Sims, supra*, at 1192. The inclusion of "education" in the list makes it clear that even if education is an area in which the choice and discretion characteristic of privacy rights may be available when there are alternatives to public education and it may be surrounded by zones of privacy, it is also an area in in which governmental intrusion or participation is strikingly present. From this observation we may infer that right to privacy not only can be infringed by laws made in accord with the state's legitimate interest but that it regularly is. *Traver v. Smith*, 78 Wash.2d 152, 470 P.2d 172 (1970), *cert. denied*, 402 U.S. 1000 (1971). How due process fits in where education is concerned is unclear because few people are afforded any judicial determination before they are thrown into school; perhaps even being labelled "truant" or a "C student" or something else like "class favorite."

Clearly this court was prudent in finding that injury to reputation did not require due process procedures. *Davis, supra*, at 701-710. When a change in legal status, an adverse effect on property or liberty rights, or a reaching of the very rights implicit in our concept of ordered liberty is combined with injury to reputation, *Davis* at 705 discussing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), procedural safeguards are necessary. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the posting of Constantineau's name as that of a problem drinker resulted in Constantineau's loss of freedom to purchase alcoholic beverages. Reputation alone, the Court held in *Davis* is not a liberty or property interest protected by the Due Process Clause. *Davis* at 712.

Logically, whether reputation is besmirched as it relates to family responsibilities, marital obligations, honesty, or drug abuse, the significance of resulting injury can best be measured for purposes of providing an adequate remedy by assessing the amount of damage

caused. Loss of employment, inability to attract new business, loss of freedom of choice in purchasing goods or in entering public places and similar consequences would indicate injury which would likely be amenable to judicial resolution. In the present case there was no damage to reputation because no dissimination of information took place. Without dissemination labelling is harmless. Injury to reputation requires a public response to the label applied. Being labelled a "perpetrator" injures no one if the appellation is not circulated.

Nevertheless, the district court found:

> The injury to these plaintiffs is far greater than the public damage to the plaintiff's reputation in *Paul v. Davis.*

Sims, id. Why the injury to Appellees was "far greater" than to the damage to Davis' reputation is not explained. Perhaps there is a hierarchy of epithets or perhaps the undisseminated accusation of injuring a child is worse than being publicly called a thief.

The CANRIS prohibits dissemination of information stored therein. Access to CANRIS information is unavailable even to workers investigating reports of child abuse. An investigating worker may only ask the CANRIS whether there have been previous reports of child abuse or neglect. Though the court said that dissemination by the CANRIS of information was impermissible, there never was any allegation at any point in these proceedings that dissemination occurred, and in fact none did occur.

Any other analysis of when due process is required creates a problem of placing monetary value on the right to privacy in some extraordinary way or of finding the very act of storing investigative information in the

CANRIS mysteriously injurious. Appellants are employees or officials of a statewide agency. CANRIS is in reality a statewide investigative file. If it is constitutionally permissible to maintain child abuse investigative files, it seems unreasonable to allow a parent to be subject to the gathering and collecting of information if he stays in one place but free of the information's effect if he moves about. Law which had that effect would encourage the very behaviors which are dangerous to children by prohibiting use of information about abusive conduct which the investigating worker did not learn on his own. If investigatory files may be maintained by the state, it is difficult to comprehend what is intrinsically more dangerous or offensive to privacy and due process rights about putting reports in a computer than in a file folder. In addition to the obvious utility of the CANRIS, no injury to Appellees resulted from the use of this limited but large investigative file.

If the state should decide to seek a change in the legal status of a parent believed to be endangering his child, judicial proceedings will be instituted with attendant due process protections. Up to that time nothing will have happened under section 34.06 to affect a parent's liberty or property interest or even his reputation interest. What will have happened to this point is an investigation will have been made.

Section 34.06 also provides for sharing information. Such sharing is anonymous. Names of persons are not provided by the CANRIS.

In discussing the limitations on personal rights of privacy this Court observed:

> [I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of

> potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right to privacy she possesses must be measured accordingly.

Roe v. Wade, 410 U.S. 113, 159 (1973). If the state has a compelling interest in protecting the health of an unborn child in the third trimester of his mother's pregnancy so as to infringe upon the parent's personal right of privacy which earlier in her pregnancy permitted her to choose an abortion, it follows that the state's interest in protecting the health of a living battered child is at least equally compelling. The fact that all 50 states currently provide for mandatory reporting of incidents of child abuse and neglect convincingly demonstrates the compelling nature of the state's interest in protecting children. [See Shepard, "The Abused Child and the Law," The Rights of Children, 174, 182-83 (1973).]

A parent's right of privacy as to the family relationship is not the primary right being protected by the CANRIS. Since a parent has no right to injure his child, it would be unreasonable to permit him to harm his child and then claim a right of privacy in order to bar interference because the matter relates to the family relationship.

Quite the contrary, if the child is being physically or emotionally injured by his parent, the state has both right and obligation to intercede to protect the child. Indeed, to protect individual rights of a parent because of the family relationship at the expense of the corresponding and sometimes competing individual rights of the child is to give the parent greater individual and privacy rights because he is a family member, while commensureately diminishing the individual and privacy rights of the child because he is a member of the same family.

III. B. DUE PROCESS DOES NOT REQUIRE AN EMERGENCY EX PARTE HEARING ON THE VERY DAY OF TAKING EMERGENCY POSSESSION OF A CHILD

The district court exceeded the bounds of established due process standards when it required that every Texas court must hold its hearing on an emergency petition seeking ratification of an extrajudicial taking of a child not beyond the very day of the seizure.

The leading, and indeed controlling case on this point is *Newton v. Burgin*, 363 F.Supp. 782 (W.D.N.C. 1973) (three-judge court), *aff. on appeal*, 414 U.S. 1139 (1974) without an opinion. In *Newton*, the plaintiffs claimed "that a parent had an immediate right to a hearing. . . ." and that a statute which allowed a five to seven day period to intervene between the state's assumption of custody of a child and the hearing was "unconstitutional in that it deprived the plaintiffs of custody without a hearing. . . ." *Newton*, at 785. The *Newton* court rejected the contention of the plaintiffs there and upheld the constitutionality of the challenged North Carolina statute. Appellees in the *Sims* case eventually abandoned an initially asserted comparable contention. The *Sims* court upheld a ten-day period from seizure of a child by the state until a full adversary hearing was held. Neither Appellants nor Appellees challenge this holding. The emergency action authorized by Section 17.01 of the Texas Family Code is explicitly approved in *Sims* at 1192. However, disagreement exists over the procedure to be followed in filing a petition and obtaining an ex parte order following an emergency removal of a child.

What remains at issue in this aspect of the appeal of the *Sims* decision is the timing of the ex parte presentation to a court of the request for judicial sanction of an extrajudicial taking of a child. The

Newton court did not require any more than such ex parte approval. The *Sims* court has required "the State to make all reasonable efforts to serve upon them [the parents] notice of this initial presentation to the court." At 1193. Appellants do not contest this additional requirement. They only argue it is impermissible to require that this emergency ex parte hearing (i.e., the initial presentation to a judicial authority) be held *not* "beyond the very day of seizure." *Sims* at 1193. Such a conclusion not only is not required by the dictates of the concept of flexible due process principles for "extraordinary situations" stemming from the cases analyzed in *Newton* at 786-787, but also is inconsistent with the tenor of the guidelines set out in those and other "extraordinary situation" cases. See *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); as well as, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Boddie v. Connecticut*, 401 U.S. 371 (1971); and *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961). Indeed, the *Newton* court implicitly approved the North Carolina State court judge's clear refusal to afford the plaintiffs therein a hearing either at eighteen hours or at three days after the State had assumed custody of their child. At 787 and 784.

The relief Appellees plead for here is so limited as to belie its importance. They ask that the representatives of the governmental agency charged with protecting the children of Texas be allowed a reasonable time (i.e., not the "very day") to seek judicial approval for the assumption of emergency custody of children whose health or safety is endangered. If such relief is not granted, the Texas Department of Human Resources will be compelled by the *Sims* decision to return such children to conditions threatening their health and physical safety for no reason other than the inability to secure judicial sanction of an emergency seizure on the "very day" it occurs.

III. C. DUE PROCESS DOES NOT REQUIRE APPOINTMENT OF AN ATTORNEY AD LITEM FOR A CHILD AT THE EMERGENCY EX PARTE HEARING

The three-judge district court held that an attorney ad litem must be appointed to represent the interests of a child who is the subject of a suit affecting the parent-child relationship. Appellants contest this ruling only insofar as the court included in its decision a requirement for representation at the ex parte hearing required in a Chapter 17 emergency proceeding. An examination of applicable constitutional standards will demonstrate that appointment of an attorney ad litem for this same day hearing is not necessary to fulfill due process requirements.

It is clear that due process standards are not static; they must be determined with regard to the time, place, and circumstances involved in the fact situation under consideration. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886 (1961). Appellants do not contest the district court's conclusion that an attorney ad litem should be appointed to represent the child in every suit affecting parent-child relationships which could be determinative of the child's status. The immediate ex parte hearing, however, can never settle any rights of any party; it is held merely to determine whether an emergency situation exists. If the court decides that the child is in need of emergency protection, a full adversary hearing, including an attorney ad litem appointed to represent the child, will be held within ten days of the Department's taking custody of the child. It is only at this second hearing that the legal relationship between a parent and child can be altered. Appointment of an attorney ad litem for the initial hearing to determine whether there is an emergency is not necessary to meet the fundamental fairness standard

for due process in juvenile proceedings. *In Re Burrus*, 403 U.S. 528 (1971). This fundamental fairness requirement will be met by appointment of a legal representative for the child for the full adversary hearing which will be held no longer than ten days from the actual seizure of the child.

An additional consideration is the undue burden such a requirement creates. If an attorney ad litem for the child were necessary for the initial hearing, an attorney would not only have to be found on short notice but would have to be paid for both the emergency ex parte hearing, as well as for the full adversary hearing. The practical implications are overwhelming, especially in the large rural areas of the state, particularly when weighed against the short-term impact of the ex parte emergency hearing.

Finally, the ruling of the district court fails to take into consideration the existing procedures used by Texas district courts handling Title 2 matters. Some urban counties, for example, have permanent full-time guardians ad litem available to represent the interests of children, pursuant to Section 11.10 of the Texas Family Code. The decision by the three-judge court fails to make it clear whether the presence of a guardian ad litem is sufficient to fulfill due process standards, or whether both a guardian and an attorney ad litem must be present.

III. D. PREPONDERANCE OF THE EVIDENCE AS THE STANDARD OF PROOF IN SUITS SEEKING TERMINATION OF PARENTAL RIGHTS SATISFIES DUE PROCESS REQUIREMENTS

The district court held that "[w]hile such a suit [affecting the parent-child relationship] is not akin to a delinquency proceeding requiring proof beyond a

reasonable doubt . . . the fundamental right to family integrity requires at the very least that the State . . . prove its case by clear and convincing evidence." *Sims* at 1194. This requirement that suits instituted for the protection of children be determined by a standard higher than preponderance of the evidence reaches far beyond the scope of due process requirements.

First, the three-judge court cited the district court opinion in *Alsager v. District Court of Polk County, Iowa*, 406 F.Supp. 10 (S.D. Iowa 1975) for the proposition that the right to family integrity deserves a standard of clear and convincing evidence. In its appellate review of *Alsager*, the Eighth Circuit expressly declined to rule on the appropriate standard of proof at a parental termination hearing in order to leave open future consideration of the issue:

> Since we expressly reserve a ruling on the question of whether the Iowa statutory provisions at issue in this case are facially unconstitutional, there is no collateral estoppel effect to be accorded the district court's resolution of this question in the future.

Alsager v. District Court of Polk County, 545 F.2d 1137, 1138 (8th Cir. - 1976). Thus, neither the Eighth Circuit nor this Court has ruled on the appropriate standard of proof in a suit affecting the parent-child relationship. That the appropriate standard is "preponderance of the evidence" rather than "clear and convincing evidence" is elaborated on in the discussion below.

Second, the three-judge court's sweeping and facile assertion that because a right is a fundamental right it mandates a clear and convincing standard of evidence is not supported by careful or persuasive analysis and is premature, especially in the area of child abuse and neglect which is developing rapidly and involves

innumerable factors which are not readily quantifiable. *Tippett v. State of Maryland*, 436 F.2d 1153, 1159 (4th Cir. 1971), *cert. dismissed as improvidently granted, under the name of Murel v. Baltimore City Criminal Court*, 407 U.S. 335 (1973), and *Powers v. State*, 556 S.W.2d 567 (Tex. 1976), held that involuntary mental commitment for an indefinite period of time requires the State to prove its case by a preponderance of the evidence rather than by clear and convincing evidence. The *Tippet* court pointed out that the present state of knowledge concerning mental illness is indefinite enough so that the "choice of the standard of the proof should be left to the state." *Tippett* at 1159. The same is true for situations where a child's physical and mental well-being is at stake. Indeed, the issue of mental and emotional illness in children and its relation to family pathology is an analogous and equally unresolved area of knowledge. Any fundamental right to family integrity cannot be considered "more fundamental" than a potential mental patient's fundamental right to liberty. Because of the difficulty in obtaining the facts constituting child abuse or neglect, the traditional standard of proof, one with which courts and juries are more familiar, should apply.

Third, as discussed in the examination of the CANRIS system, in Question III above, a parent's right to rear his child as he sees fit is not the only important right to be weighed, the child's right to protection from abuse and neglect is of at least equal importance. Additionally, workers who investigate child abuse cases are not trained in the gathering of evidence as are law enforcement officers. By demanding a standard of clear and convincing evidence, this right to protection is seriously jeopardized, since by social custom as well as statutory and constitutional law family life is already shielded from public view and precipitous intervention.

Finally, an application of the clear and convincing evidence standard in suits affecting the parent-child relationship where conservatorship or termination is sought would be an unwarranted intrusion into state evidentiary law. In Texas, where litigating parties have a right to have fact issues in equity as well as at law tried before a jury, "clear and convincing evidence" is a judicial standard of factual sufficiency and may not be submitted to the jury. *Meadows v. Green*, 524 S.W.2d 509, 510 (Tex. 1975); *Omohundro v. Matthews*, 341 S.W.2d 401, 410-411 (Tex. 1960); *McCormick's Handbook of the Law of Evidence*, 2nd Edition (1972) p. 797, fn. 73. Thus, requirement of this higher standard would not only alter the Texas evidentiary system radically, it would also constitute a violation of the comity principles enunciated in *Younger v. Harris*, 401 U.S. 37 (1971) and its civil progeny. Additionally, it would likely be ineffective in protecting parental rights since the standard is difficult for lay-persons to grasp and perhaps also be excessive in protecting parental rights by discouraging suits against abusive parents because adequate evidence could rarely be amassed.

Moreover, by its very consideration of the standard of proof issue, the district court acted beyond the scope of its powers as set out by Article III of the United States Constitution. By the terms of this Article, the judicial authority of federal courts is limited to cases or controversies. U.S. CONST. ART. III, § 2, *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974). In order to establish a case or controversy, a plaintiff must allege direct injury or threat of direct injury to himself. *O'Shea* at 494. If the issue argued by the plaintiff is merely hypothetical, its consideration is outside the scope of the power of the federal judiciary since any ruling would constitute a mere advisory opinion. *Hall v. Beals*, 396 U.S. 45, 48 (1969).

The district court reached the issue of standard of proof in suits affecting the parent-child relationship by stating that even though no such suit had been brought with regard to the Sims children, "the spectre of a Chapter 15 ["Termination of the Parent-Child Relationship"] suit involving the Sims family is sufficient to confer standing." *Sims*, at 1190. The court incorrectly stated in its opinion that a Chapter 15 action had been filed on May 14, 1976; no such action was *ever* filed in this suit. The court brought the issue of standard of proof into question by reasoning that since a Chapter 15 suit *could* eventually be brought by the Texas Department of Human Resources with regard to Paul Sims, this possibility conferred on the three-judge court the jurisdiction to consider the constitutionality of the standard of proof which would be used in such a suit. This attempt to bring the standard of proof issue within the Article III grant of judicial authority falls short of constitutional standards for several reasons.

First, the district court justified its consideration of the standard of proof question by stating that "This court has, upon the advice of both parties, carefully viewed the challenged provisions as being interdependent." *Sims, id.* Since Appellants repeatedly objected to the court's consideration of Family Code provisions not actually involved in the factual dispute, it is clear that Appellants never agreed that the challenged provisions were interdependent. (Transcript of Proceedings, October 26, 1976, pp. 36, 153-55, and 182). Thus, the three-judge court's examination of the standard of proof in suits affecting the parent-child relationship was not done by agreement of the parties.

Second, the criteria for a case or controversy set out in the two cases the district court employs to justify its consideration of the standard of proof, *O'Shea v. Littleton*, 414 U.S. 488 (1974) and *Massachusetts v.*

Mellon, 262 U.S. 447 (1923) are not met by the facts in this case. The language of *O'Shea* and *Mellon* expressly state "[a]bstract injury is not enough," *O'Shea* at 494, and the plaintiff must allege that he "has sustained or is immediately in danger of sustaining some direct injury," *Mellon* at 488. The Simses did not face the requisite direct injury by the challenged standard of proof provision. In the first place, no termination suit where the "preponderance of the evidence" standard would have been used had even been brought against the Simses. They had never been subjected to the challenged statute and therefore suffered no injury. In the second place, the only possible threat of imposition of the challenged standard came from the caseworker Rex Downing's statement that he would probably recommend that termination of the parent-child relationship be sought. This alleged "threat" fails to meet the "immediate danger of direct injury" criterion set out in *Mellon*, since a single caseworker does not have the authority to make the decision to institute a termination proceeding. Under Texas Department of Human Resources regulations, when a child is to be removed from his home the decision as to whether court action will include a request for termination must be concurred in by the supervisor, as well as the caseworker. Thus, Mr. Downing's statement that he would recommend that termination be sought falls far short of proving that the Sims suffered even the requisite threat of injury, much less any direct injury.

Finally, even if the Simses had faced direct injury from a termination proceeding, the allegations regarding the standard of proof fail to meet the "case or controversy" standard since the child in question was returned to his parents before the trial on the merits. In order to be a case or controversy, the actual controversy must exist at the time of appellate review and not simply at the date the action is initiated. *Roe v. Wade*, 410 U.S. 113, 123-129 (1973). Thus, since there is presently no

reasonable expectation that Paul Sims will be the subject of a suit affecting the parent-child relationship which would use the challenged standard of proof, the issue fails to meet the case or controversy standard for lack of ripeness, and the three-judge court ruled on this issue outside the scope of its constitutional power.

CONCLUSION

The three-judge court should have abstained. There was no jurisdiction as to many of the constitutional issues raised. The case was decided wrongly as shown above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing Jurisdictional Statement have on this the 30th day of June, 1978 been sent by United States Postal Service, Certified, Return Receipt Requested, to the following:

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